87-470

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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QUESTIONS PRESENTED

1. Is Indiana's civil RICO statute an impermissible prior restraint of the type described in *Near v. Minnesota,* 283 U.S. 697 (1931), to the extent that that statute was construed to permit the padlocking of numerous bookstores and the mass seizure of not only their entire inventories, but also all their physical equipment including book racks, film projectors, cash registers, etc., all upon an *ex parte* probable cause determination that the stores in question had sold or exhibited two or more allegedly obscene items?

2. Are the First Amendment procedural safeguards of *Freedman v. Maryland,* 380 U.S. 51 (1965), and *Vance v. Universal Amusement Co.,* 445 U.S. 308 (1980), violated by a state law which permits bookstores to be closed by interim padlocking and seizure orders of *indefinite duration* where the law fails to guarantee that a final determination of obscenity will necessarily occur within a specified brief period after the seizure? Does the Indiana Supreme Court's conclusion that the statute requires such a hearing to be held within a "reasonable" time satisfy *Freedman's* requirement of a "specified" brief period where no guidelines are given for determining the duration of this "reasonable" period and the court approved as "reasonable" an *ex parte* seizure which has remained in effect for over a year without any final determination of obscenity?

3. Are the First Amendment principles articulated in *Marcus v. Search Warrant,* 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964); *Carroll v. Presi-*

dent and Com'rs of Princess Anne, 393 U.S. 175 (1968); *Heller v. New York*, 413 U.S. 483 (1973) and *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), violated by a state law which was construed and applied to permit mass seizures of the entire inventories of numerous bookstores based exclusively upon an *ex parte* showing that two or more of the items sold in the stores are probably obscene? Do these cases continue to require that notice and some form of adversary hearing must occur *prior* to any such mass seizures?

4. May the entire inventory and contents of a bookstore be seized where the issue of obscenity need only be proven by a "probable cause" standard of proof? Does this most minimal evidentiary requirement conflict with the principles this Court articulated in *California ex rel. Cooper v. Mitchell Bros.*, 454 U.S. 90 (1981)?

5. Does Indiana's RICO statute violate the First Amendment principles articulated in *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977), by virtue of the fact that it provides no guarantee of prompt appellate review of either interim or permanent seizure orders and, in one instance, three stores remained closed by virtue of an interim order for over a one-year period before there was even an initial appellate court ruling on a promptly filed emergency stay application?

6. In upholding the sanctions available under the state's civil RICO laws as applied to persons alleged to have violated only the state's obscenity laws, did the Indiana Supreme Court ignore this court's holdings in *Thomas v. Collins*, 323 U.S .516 (1945) and *Schad v. Burrough of Mt. Ephraim*, 452 U.S. 61 (1981), that the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised by the state?

7. Do Indiana's civil RICO statutes' post-trial remedies, as sanctioned by the Indiana Supreme Court, violate the First Amendment guarantees against prior restraint articulated in *Near v. Minnesota, supra*?

LIST OF PARTIES*

The following is a list of all parties of record in the Indiana Supreme Court in addition to those appearing in the caption of the present petition:

CINEMA BLUE OF FORT WAYNE, INC., EROTIC HOUSE BOOKSTORE, INC., 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATER CORPORATION, PLAZA ENTERTAINMENT CENTER and BURTON GORELICK appeared as appellants in the Indiana Supreme Court.

STEPHEN M. SIMS, Prosecuting Attorney for the 38th Judicial Circuit, and STEPHEN GOLDSMITH, Prosecuting Attorney for the 19th Judicial Circuit, appeared as appellees in the Indiana Supreme Court.

As indicated under separate cover, petitioner FORT WAYNE BOOKS, INC., believes that 4447 CORPORATION, WORLD VIDEO SYSTEMS, ISSI THEATER CORPORATION, CINEMA BLUE OF FORT WAYNE, INC., and EROTIC HOUSE BOOKSTORE, INC. have no interest in the outcome of this petition. Accordingly, pursuant to Supreme Court Rule 19.6, petitioner believes the respondents before this Court to be:

THE STATE OF INDIANA
STEPHEN M. SIMS
STEPHEN GOLDSMITH
PLAZA ENTERTAINMENT CENTER
BURTON GORELICK

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* There are no entities to report or list pursuant to this Court's Rule 28.1.

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In The
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FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

OPINIONS BELOW

The opinion of the Indiana Supreme Court is reported as *4447 Corporation v. Goldsmith*, 504 N.E.2d 559 (Ind. 1987) and is printed in Appendix A; the order and opinion denying rehearing are reported at 509 N.E.2d 174 (Ind. 1987) and are printed in Appendix E; the order denying a stay pending the timely filing of a petition for certiorari by an unrelated party below is unreported and is printed in Appendix B. The opinion of the Indiana Court of Appeals is reported as *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985) and is printed in Appendix C.

JURISDICTION

The Supreme Court of the State of Indiana entered its opinion in this matter on March 2, 1987. The Court entered an opinion denying rehearing on June 18, 1987. This petition is filed within 90 days of that date. The opinion of the Indiana Supreme Court constitutes a final judgment in a civil case upholding the constitutionality of various pre-trial restraints on constitutionally protected expression imposed pursuant to Indiana's state RICO law. The Court's opinion also implicitly gave constitutional approval to the post-trial forfeiture remedies available under that same law. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 2101(c).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS FROM INDIANA CODE

The pertinent provisions of the Indiana Code are presented in Appendix F. The sections so included are: IC §§ 34-4-30.5-1 through 34-4-30.5-6, §§ 35-45-6-1 and 35-45-6-2, §§ 35-49-1-1 through 35-49-1-10, § 35-49-2-1, and §§ 35-49-3-1 through 35-49-3-4.

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STATEMENT OF THE CASE

This case involves the question of whether the seizure and padlocking sanctions available under a state's RICO statutes are constitutionally permissible as applied to those whose only alleged offenses involve the sale or exhibition of two or more allegedly obscene items.

Petitioner Fort Wayne Books, Inc. operates an adult bookstore in Fort Wayne, Indiana, known as Fort Wayne Books. Prior to March 19, 1984, petitioner's bookstore offered for retail sale thousands of different sexually-oriented books, magazines, motion picture films and videotapes, all of which were and are presumptively entitled to constitutional protection. The store also operated numerous motion picture viewing booths wherein a customer could privately view any of a number of different motion picture films or videotapes.

On March 19, 1984, respondents Stephen M. Sims and the State of Indiana filed a complaint against petitioner and others in the Allen Circuit Court of Allen County, Indiana, charging them with violation of Indiana's state civil RICO statute (IC § 35-45-6-1 *et seq.*). The sole bases for the civil RICO allegations were alleged violations of Indiana's obscenity laws.

On that same date, these respondents filed a "Verified Petition for Seizure of Property Subject to Forfeiture, etc." against petitioner and the other defendants, seeking an *ex parte* order authorizing them to padlock petitioner's bookstore and two other bookstores and to seize immediately all of the inventory, equipment and corporate assets therefrom. This petition was supported by a police officer's probable cause affidavit alleging that the corporate owners of these bookstores and their employees had been convicted of certain obscenity offenses that, according to the officer, constituted valid "predicate offenses" triggering application of the RICO statute.[1] The officer also alleged that he had personally viewed a number of motion picture films and videotapes exhibited in petitioner's store and had concluded that they were legally obscene. The officer made similar allegations as to the other two bookstores named in the complaint.

On this same date, March 19, 1984, an *ex parte* hearing was held on the state's forfeiture petition. Neither petitioner nor its agents or attorneys were given any notice of the hearing.

[1] Petitioner does not agree that any of the convictions alleged in the officer's affidavit constitute valid predicate offenses under Indiana's RICO statute. However, resolution of this issue will involve complicated issues of statutory construction not here relevant. Of course, since the seizure application was made ex parte, there was no opportunity for petitioner to contest the officer's assertion that the requisite predicate offenses had been committed.

Following the *ex parte* hearing, the trial court immediately concluded that there was probable cause to believe that petitioner and the owners of the other two bookstores had committed two or more violations of the state's obscenity laws and that such conduct constituted a violation of the state's civil RICO statute. Accordingly, the trial court, without any notice to petitioner or the other affected businesses, issued an order commanding the immediate seizure of the entire contents of each of the three bookstores and authorizing the immediate padlocking of all three stores. (The seizure order is reproduced in Appendix D.)

The authorities then padlocked all three bookstores and denied access to them by store employees and the public alike. No trial date was set, nor has one ever been set in this case.

Thereafter, petitioner promptly filed a motion in the trial court to vacate the *ex parte* order of seizure and closure. This motion asserted that the *ex parte* order lacked the numerous procedural safeguards required by the First Amendment and also, in any event, constituted a prior restraint of First Amendment rights. (Memorandum of Law In Support Of Motion To Vacate And/Or Modify, etc., filed in the Allen Circuit Court on March 27, 1984.)

On March 29, 1984, a hearing was held on petitioner's motion to vacate the *ex parte* order. During the course of this hearing it was brought to the trial court's attention that a virtually identical *ex parte* pretrial closure order had been issued pursuant to these same civil RICO

provisions in a case involving certain adult bookstores in the City of Indianapolis and that this *ex parte* order had been stayed by order of the Indiana Court of Appeals pending disposition of the bookstore owners' interlocutory appeal from the interim closure order. Notwithstanding the Allen County trial court's awareness of this ruling of its own state intermediate appellate court, the trial court, on March 29, 1984, denied petitioner's motion to vacate the *ex parte* closure and seizure order.

The next day, March 30, 1984, after the stores of petitioner and the other defendants had already been padlocked, the authorities then, without notice, commenced removal of the entire contents of the three establishments, including tens of thousands of unlitigated books, magazines and films, as well as items such as film projectors, cash registers and bookracks. As mentioned above, the *sole* basis for these mass seizures was the allegation that each store had committed two or more prior obscenity offenses.

On April 3, 1984 the defendants filed an Emergency Motion for Inventory of Property Removed and/or for Return of Property. This motion was denied by the trial court on April 4, 1984.

On April 3, 1984 and thereafter, on April 12, 1984, the defendants filed with the trial court a petition to certify and a supplemental petition to certify its interim orders as appealable by interlocutory appeal. On April 18, 1984 the trial court granted the request for certification but denied a motion to stay its interim injunctive order pending the interlocutory appeal. On April 27, 1984, the corporate defendants, including petitioner, perfected their interlocutory appeal and simultaneously filed in the Indiana Court of Appeals an emergency stay application, designated as Motion For Stay (Modification) Of Interlocutory Injunction Without Bond Pending Appeal. Petitioner's stay application asserted, *inter alia*, that, under *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977), a stay pending appeal was mandatory because state law did not provide for immediate appellate review of the interim *ex parte* closure order. Petitioner's other substantive and procedural challenges were jointly presented in its stay application and in its briefs filed on the merits of the interlocutory appeal.

Despite repeated written and oral requests by petitioner and the other appellants for immediate consideration of their stay application[2] pending the interlocutory appeal,

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[2] On May 2, 1984, five days after petitioner filed its application for stay in the Court of Appeals, respondent Sims filed a Verified Petition For Transfer Of Case to the Supreme Court of Indiana. Under Indiana law, the effect of the filing of such a petition is to immediately divest the Court of Appeals of jurisdiction over both the stay application and the merits of the interlocutory appeal. However, this procedural device placed the issues relevant to the stay squarely before the Supreme Court of Indiana. Nonetheless, after nearly three months, the Indiana Supreme Court denied the petition for transfer on July 17, 1984 and expressly remanded the stay application back to the Court of Appeals.

Petitioner then expected a prompt consideration of its stay application because two days after the Petition For Transfer had been filed (May 2, 1984) the Court of Appeals transferred the Fort Wayne case to the division of the Court of Appeals which had issued a similar stay request in the Indianapolis case. However, when, by September 23, 1984, no action had yet been taken by the Court of Appeals on the stay application, petitioner filed another document in the Court of Appeals entitled "Request For Expeditious Ruling On Motion For Stay (Modification) Filed April 27, 1984."

Respondent Sims filed papers on October 10, 1984 urging the Court to defer action on the stay request pending ultimate resolution of the appeal.

(Continued on next page)

there had still been no appellate ruling on the stay application as of March 26, 1985, nearly a full year after it was filed. Throughout that time, all three bookstores remained sealed and padlocked by virtue of the trial court's unreviewed *ex parte* closure order.

On March 26, 1985, petitioner and the other bookstore owners filed an application to Circuit Justice Stevens of this Court for a stay of the *ex parte* interim injunctive order.[3] Acting in his capacity as Circuit Justice, Justice Stevens ordered respondents to respond to petitioner's stay application on or before April 4, 1985.

On April 4, 1985, the Indiana Court of Appeals rendered moot the stay application presented to Justice Stevens by finally granting the year-old stay application. Thereafter the padlocks were removed and the three bookstores were allowed to resume operations pending the outcome of the appeal.

During roughly the same period that the foregoing litigation involving the Fort Wayne bookstores was taking place, a similar state RICO action was filed and litigated against three wholly unrelated bookstores in Indianapolis. These three stores were alleged to be part of one "enterprise." The primary difference was that there were no allegations in the Indianapolis case that any of the stores or their employees had been convicted of *any* obscenity violations. Rather, that RICO complaint was based exclusively upon probable cause allegations of obscenity viola-

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In addition to the foregoing efforts of petitioner to secure appellate consideration of its stay application, its counsel made repeated calls to the Clerk of the Court of Appeals advising them of the need for prompt consideration of the stay application.

[3] *Fort Wayne Books, et al. v. Indiana, et al.*, Docket # A-734.

tions at two of the three stores. The other primary difference is that in the Indianapolis case, one of the three stores had not yet opened at the time the court issued its *ex parte* order.

The Indianapolis trial court issued an *ex parte* order commanding the sealing of the one not-yet opened store but allowing the other two stores to continue to operate, subject to the restraint that they could not transfer any of their assets. There was no allegation that the restrained store had ever violated *any* obscenity law.

Just as in the Fort Wayne litigation, the Indianapolis bookstores filed an interlocutory appeal from the interim *ex parte* orders and simultaneously sought a stay from the Court of Appeals pending the outcome of the interlocutory appeal. That stay was granted on February 2, 1984.

On May 4, 1984 the Indiana Court of Appeals ordered the consolidation of the interlocutory appeals in the Indianapolis case and the Fort Wayne case. Even so, as mentioned above, the Court of Appeals inexplicably delayed ruling on the Fort Wayne appellants' stay application until nearly a year later, April 4, 1985.

On June 12, 1985 the Indiana Court of Appeals issued its ruling on the consolidated interlocutory appeal. (Appendix C.) The court concluded that, as applied to those whose only alleged offenses involve violations of the state's obscenity law, the seizure and padlocking sanctions of the state RICO Act constitute an unconstitutional prior restraint of First Amendment rights. The court also concluded that the statute and the appealed *ex parte* orders are unconstitutional because they lack several procedural safeguards required by the First Amendment.

Thereafter, the Indiana Supreme Court reversed the judgment of the Court of Appeals. In a split opinion, the

majority concluded that a statute authorizing direct sanctions against protected expression need not be measured by First Amendment standards if the legislative purpose was non-censorial. It was apparently immaterial to the court's holding that the sanctions only come into play upon a finding of unlawful *expressive* activity. (Contrast this Court's recent holding in *Arcara v. Cloud Books,* — U.S. —, 106 S.Ct. 3172 (1986).) Concluding that the statutory purpose of including obscenity as a predicate RICO offense was unrelated to a desire to suppress speech, the court held that the Court of Appeals had erred in subjecting the statute to First Amendment-prior restraint analysis. Dissenting, Judge DeBruler disagreed with the underlying premise of the majority opinion, choosing to rely instead on this Court's holding most recently articulated in *Schad v. Burrough of Mt. Ephraim,* 452 U.S. 61, 68 (1981), that "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised [by the state]."

The majority also rendered two significant constructions of the statute. First, it held that the state need not allege *any* prior obscenity convictions but need only make probable cause allegations of unproved obscenity violations. Second, in upholding the Indianapolis order sealing the one location which had never been open, the court necessarily construed the statute so that two or more obscenity violations at any one store in a chain of stores justifies closure orders directed to any or all of the stores in the chain.

Finally, the majority opinion rejected petitioner's claim that the *ex parte* seizure and padlocking procedures authorized by the statute lacked adequate procedural safe-

guards required by the First Amendment. Specifically, the majority entirely ignored petitioner's contention that mass seizures of literature can never be conducted on the basis of *ex parte* probable cause determinations.

The only one of petitioner's procedural arguments specifically addressed by the court's opinion was the contention that the interim restraints are void because they are of indefinite duration and that the statutory scheme fails to require a final trial court determination of obscenity within a *fixed* or *specified* brief period. The court noted that the statute does not require trial to be set within any specified period of time after execution of the seizure order. However, rather than reading into the statute a specific time limit for the holding of such a trial, the court instead construed the statute merely to require a trial "within a 'reasonable' time."

For reasons not here relevant, the three bookstores involved in the Indianapolis litigation have ceased doing business as have all of the Fort Wayne bookstores except for petitioner, Fort Wayne Books, Inc.

There has been no trial yet in this action nor has a trial date been set.

Petitioner has been informed that, absent this Court's review, respondent Sims will reinstitute the padlocking of petitioner's store.

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REASONS FOR GRANTING THE WRIT

I

THE INDIANA SUPREME COURT'S DECISION UPHOLDING THE RICO STATUTE'S LACK OF PROCEDURAL SAFEGUARDS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

A. The Statute's Authorization of Ex Parte Orders Authorizing Mass Seizures and Padlocking of Businesses Engaged in First Amendment Activity Without Notice or a Prior Adversary Hearing Is in Conflict with This Court's Opinions in Marcus v. Search Warrant, 367 U.S. 717 (1961); Quantity of Books v. Kansas, 378 U.S 205 (1964); Carroll v President and Com'rs of Princess Anne, 393 U.S. 175 (1968); Heller v. New York, 413 U.S. 483 (1973); and Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).

The Indiana Supreme Court's opinion approved of the *ex parte* seizure and padlocking order in this case even though respondents made absolutely *no attempt to notify* petitioner nor was petitioner given *any* opportunity to appear and be heard prior to the issuance of the order authorizing seizure of an enormous quantity of presumptively protected media materials.

In *Marcus v. Search Warrant*, 367 U.S. 717 (1961) and *Quantity of Books v. Kansas*, 378 U.S. 205 (1964), this Court held that there could be no mass seizure of the inventory of a book store in the absence of a prior adversary hearing wherein the court could focus searchingly on the obscenity of every item which the State sought to seize.

In the subsequent case of *Carroll v. President and Com'rs of Princess Anne*, 393 U.S. 175 (1968), this Court

expanded the principles of *Quantity of Books* into a general prohibition of *ex parte* injunctions restraining activities ordinarily constituting speech and press activity. *Carroll* held that, at a bare minimum, some advance notice is required in every case.

Finally, in *Heller v. New York*, 413 U.S. 483 (1973); *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979); and *New York v. P. J. Video, Inc.*, — U.S. —, 106 S.Ct. 1610 (1986), this Court indicated that it continues to follow the holdings in *Quantity of Books* and *Marcus*, both *supra*, that "the large scale seizure of books or films constituting a 'prior restraint' must be preceded by an adversary hearing on the question of obscenity." *P. J. Video, supra*, — U.S. —, 106 S.Ct. at 1614.

Accordingly, the *ex parte* order upheld by the Indiana Supreme Court is in conflict with a substantial body of this Court's precedent.

B. The Statute's Authorization of Interim Seizure and Padlocking Orders of Indefinite Duration Is in Conflict with This Court's Opinions in Freedman v. Maryland, 330 U.S. 51 (1965) and Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

The *ex parte* seizure order in this case was an interim order of indefinite duration based upon a mere probable cause showing that two or more obscenity violations had occurred. This is precisely the type of procedure that was most recently condemned by this Court in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980). In *Vance* this Court condemned a Texas statutory scheme whereby a trial court was authorized to issue an interim injunction of indefinite duration against the exhibition of

any obscene motion pictures whether named or unnamed, all upon a preliminary finding that one or more obscene film(s) had been exhibited in the past. Relying upon its holdings in *Freedman v. Maryland,* 380 U.S. 51 (1965), and *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546 (1975), this Court concluded that the indefinite duration of the interim injunction created an impermissible prior restraint upon the exhibition of films which may or may not ultimately prove to be obscene in a final determination.

In *Freedman, supra,* this Court held that any restraint on the exhibition of films believed to be obscene prior to a final judicial determination on the merits must be limited to "the shortest *fixed* period compatible with sound judicial resolution." (Emphasis added) 380 U.S. at 59. As the Indiana Supreme Court conceded, there is nothing in the statutory framework here at issue which compels a final judicial determination within any specified period. Although the Indiana Supreme Court had the opportunity to engraft a fixed period into the statute by way of an authoritative saving construction, it declined to do so and instead, simply held that the statute required trial to occur "within a 'reasonable' time" without any further clarification of that phrase. The facts of the present case patently demonstrate the unworkability of so vague a standard.

C. The Statute's Failure To Guarantee Any Prompt Appellate Review of Interim or Permanent Seizure and Padlocking Orders Is in Conflict with This Court's Holding in National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).

The Indiana statutory RICO scheme not only fails to require a prompt *trial court* determination of the merits

of the forfeiture proceeding, but fails to guarantee the availability of either "immediate" or "prompt" *appellate* review of any interim or final injunctive orders. The gravity of this defect was illustrated by the facts in this very case. Petitioner filed an application for a stay in the Indiana Court of Appeals within a few days of the date that the trial court denied its motion to vacate the *ex parte* seizure order. Notwithstanding every effort by petitioner to attempt to gain prompt appellate review of the stay application, it was over a year before the Court of Appeals finally granted the requested stay. Throughout that time period all three Fort Wayne bookstores remained closed under the force of the *ex parte* padlocking order.

In *National Socialist Party of America v. Village of Skokie,* 432 U.S. 43 (1977), a trial court had entered a permanent injunction preventing petitioners from conducting a march or parade displaying the swastika within the village of Skokie, Illinois. Relying once again on the seminal case of *Freedom v. Maryland, supra,* this Court held that the petitioners were entitled, as of right, to a stay of that injunctive order in the absence of "immediate appellate review" of the trial court's injunction. *Accord, M.I.C., Ltd. v. Bedford Township,* 463 U.S. 1341 (1983) (per Brennan, J., as Circuit Justice). It would seem to follow with equal force that any interim *ex parte* injunction of speech-related activities such as was issued by the trial court herein would be equally void absent a guarantee of immediate, or at least very prompt, appellate review.

Although there has now been a ruling on petitioner's interlocutory appeal, the facts of this case demonstrate that this is an issue which, if left unresolved, will continue

to cause substantial irreparable injury while evading ultimate appellate review. Accordingly, this Court is urged to grant review and squarely delineate that neither interim nor permanent restraints of the type involved in this case may constitutionally be enforced prior to final judicial resolution absent an express statutory guarantee of prompt appellate review which must occur within a specified brief period.

D. The Statute's Authorization of Mass Seizures Based Only Upon a Probable Cause Standard of Proof of Obscenity Is in Conflict With the Principles Articulated in California ex rel. Cooper v. Mitchell Bros., 54 U.S. 90 (1981).

In *California ex rel. Cooper v. Mitchell Bros.*, 54 U.S. 90 (1981), the State brought an action seeking to permanently restrain the exhibition of specific allegedly obscene films. The issue presented to this Court was whether or not the trial court erred in concluding that the State was constitutionally required to prove obscenity by the evidentiary standard of "beyond a reasonable doubt." This Court did not resolve the question of the *minimal* standard of proof that is constitutionally required, but merely held that proof beyond a reasonable doubt was not required in that case. This Court's opinion, however, recognized that there was a lesser standard of proof, the "clear and convincing" standard, which was "reserved to protect particularly important interests in a limited number of civil cases." 454 U.S. 93. Relying on this language, the California appellate court on remand concluded that the clear and convincing evidence standard was in fact constitutionally required by the First Amendment. See *People ex rel.*

Cooper v. Mitchell Brothers', 128 Cal.App.3d 937, 180 Cal. Rptr. 728 (1982).

In the present case, a restraint far greater than that of a few specific films found obscene occurred. Here, the Court's *ex parte* order prohibited petitioner from exhibiting not only the few films specifically found to be probably obscene, but also prevented petitioner from exhibiting *any* films or from selling any books, magazines, videotapes, etc. While restraints as pervasive as those imposed here by the trial court would be impermissible under *any* standard of proof, certainly the "probable cause" standard of proof utilized herein is *far* below the minimal constitutional threshold for *any* type of injunction of presumptively protected expression.

II

THE USE OF RICO LAWS TO RESTRAIN ALL PRESUMPTIVELY PROTECTED FUTURE SPEECH BY THE DEVICE OF PADLOCKING A BUSINESS FOUND TO HAVE VIOLATED OBSCENITY LAWS IN THE PAST, PRESENTS AN EXTREMELY IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH REQUIRES RESOLUTION BY THIS COURT.

A. This Court Should Resolve Whether the Doctrine of Prior Restraint Established in Near v. Minnesota, 283 U.S. 697 (1931), Prohibits the State From Padlocking a Bookstore, Thus Restraining All Future Speech at Such Store, Simply Based Upon Two or More Alleged Violations of State Obscenity Laws.

The trial court's *ex parte* seizure order, pursuant to which vast quantities of presumptively constitutionally protected materials were removed from petitioner's store,

is in clear conflict with the various "First Amendment due process" lines of case authority discussed *supra*. However, by also commanding the seizure of *neutral* items necessary for conducting the business (*e.g.*, cash registers, film projectors, book racks, etc.) and ordering the padlocking and sealing of all three book stores, the trial court's order also *prospectively* prevented petitioner from selling or exhibiting media materials which did not even exist at the time of the trial court's order. This absolute restraint on *future* presumptively protected activity is precisely the type of restraint which this Court condemned in the landmark case of *Near v. Minnesota*, 283 U.S. 697 (1931).

In *Near, supra*, this Court struck down a statute providing for the abatement, as a public nuisance, of any business which "regularly or customarily" published defamatory publications.

The plaintiff had filed a civil action under the statute for abatement of a public nuisance, alleging that on nine separate dates the defendant had published defamatory newspaper articles and that the defendant was in the business of "regularly" or "customarily" publishing defamatory articles. The trial court made findings of fact following the allegations of the complaint, concluding that the defendants "did engage in the business of regularly and customarily producing, publishing and circulating a . . . defamatory newspaper." 283 U.S. at 706. Based on these findings, the Court permanently enjoined the defendants from publishing any future defamatory articles. The Minnesota Supreme Court affirmed the judgment.

On appeal, this Court concluded that the statute's operation and effect was to impose a prior restraint on future publications and that the First Amendment prohibits the states from restraining future presumptively protected expression based upon prior unlawful speech activity.

Indeed, this Court stressed that the *number* of prior speech violations was immaterial to its holding:

> "[I]t does not matter that the newspaper or periodical is found to be '*largely*' or '*chiefly*' devoted to the publication of such derelictions." (Emphasis added). 283 U.S. at 720.

This Court also pointed out that its holding was not affected by whether or not the libelous speech might constitute a criminal act. *Id.* at 720.

Finally, this Court held that the state's characterization of the undesired speech activity as a "nuisance" could not allow the restraint to escape First Amendment scrutiny.

> "Characterizing the publication as a business and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Id.* at 720.

Similarly, characterizing two prior obscenity violations as "racketeering activity" provides no talismanic immunity from the constitutional prohibition against prior restraints.

B. Resolution of This Issue by This Court Is Important Because a Growing Number of States Are Adopting Similar RICO Laws and There Is a Conflict Among the States As to Their Constitutionality.

Subsequent to the federal government's enactment of the initial RICO legislation (18 U.S.C. § 1961 *et seq.*), a growing number of states have adopted their own RICO laws and, unlike the original federal RICO statutes, some of these states have included obscenity offenses as predicate acts justifying the full panoply of severe RICO sanctions. For example, the states of Indiana, Florida and Arizona all include obscenity as a predicate offense capable of triggering application of their RICO laws. The growing use of this dangerous enforcement tool strongly militates in favor of this Court's discretionary review.

Moreover, the state courts appear divided on the question of whether these summary and draconinan laws can be used as a substitute for enforcement of traditional obscenity statutes. In a very recent opinion, the Arizona Court of Appeals cited with approval the opinion of the Indiana Court of Appeals in the present case and disagreed with the majority holding of the Indiana Supreme Court, concluding that the Arizona RICO statute was unconstitutional as applied to situations where the only predicate offenses involved alleged violations of the state's obscenity laws. A copy of that opinion is reproduced in Appendix G.

There is also a split among the lower state and federal courts on the closely related question of whether bookstores or theaters can be padlocked as "nuisances" or have their licenses revoked simply upon a finding that, in the past, they have sold or exhibited one or more obscene items.

The overwhelming majority of state and lower federal courts to have considered this issue have concluded that such restraints violate the First Amendment principles initially articulated in *Near, supra,* and are void on their face.[4]

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[4] The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co., Inc. v. Vance,* 587 F.2d 159, 164-166 (5th Cir. en banc 1978) [as to this particular point, all 14 judges of the en banc court were in agreement], *aff'd.* on other grounds, 445 U.S. 308 (1980); *Pollitt v. Connick,* 596 F.Supp. 261, 269-272 (E.D.La. 1984); *People ex rel. Busch v. Projection Room Theater,* 17 C.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976), cert. den. 429 U.S. 922 (1976); *General Corp. v. Sweeton,* 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *Kansas v. Motion Picture Entitled "The Bet",* 219 Kan. 64, 547 P.2d 760 (1976); *Gulf States Theaters of Louisiana v. Richardson,* 287 So.2d 480 (La. 1974); *New Riveria Arts Theatre v. Davis,* 219 Tenn. 652, 412 S.W.2d 890 (1967); *Society to Oppose Pornography, Inc. v. Thevis,* 255 So.2d 876 (La.App. 1972); *Giarrusso v. D'Iberville Gallery,* 295 So.2d 891 (La.App. 1974); *State ex rel. Blee v. Mohney Enterprises,* 289 N.E. 2d 519 (In.App. 1973); *Sanders v. State,* 231 Ga. 608, 203 S.E.2d 153 (1974); *State ex rel. Field v. Hess,* 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emberg,* 347 A.2d 712 (Penn. 1975); *City of Minot v. Central Ave. News, Inc.,* 308 N.W.2d 851 (N.D. 1981); *Parish of Jefferson v. Bayou Landing Ltd., Inc.,* 350 So.2d 158 (La. 1977); *overruling La.App.,* 341 So.2d 23; *Mitchem v. State ex rel Schaub,* 250 So.2d 883 (Fla.1971). *See also Nihiser v. Sendak,* 405 F.Supp. 482, 491-492 (N.D.Ind.1974), *vacated and remanded on other grounds,* 423 U.S. 976 (1975), *order re-entered* August 16, 1976 (unpub.), *aff'd.* 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd,* 420 U.S. 592, 612, n. 23 (1975); *cf. Speight v. Slaton,* 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch",* 307 N.E.2d 911 (Ohio 1974).

The following cases have held unconstitutional laws which allow a permit to be either revoked or denied upon a prior obscenity violation: *Gayety Theaters, Inc. v. City of Miami,* 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc. III v. Maciejewski,* 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria,* 475 F.Supp. 1199, 1207-09 (C.D.Ill. 1979), *aff'd.* 619 F.2d

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Only a tiny fraction of the state and lower federal courts to have considered these issues have upheld such restraints.[5]

C. This Issue Should Be Resolved By This Court Because the Federal RICO Statute Has Been Recently Amended To Include Obscenity As a "Predicate Offense" and Federal RICO Prosecutions Based Solely Upon Obscenity Offenses Have Now Commenced.

Although the federal RICO statute (18 U.S.C. § 1961, *et seq.*) did not originally include obscenity as one of the predicate offenses constituting "racketeering activity," it

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1203, 1217-1220 (7th Cir. 1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville*, 480 F.Supp. 151 (M.D.Fla. 1979); *Natco Theatres Inc., v. Ratner*, 463 F.Supp 1124 (S.D.N.Y. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F.Supp. 820 (D. Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Oregon Bookmark Corp. v. Schrunk*, 321 F.Supp. 639 (D.Oregon 1970); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co. Bd. of Sup'rs.*, 128 Cal. App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *City of Delevan v. Thomas*, 31 Ill. App.3d 630, 334 N.E.2d 190 (1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S. 2d 552 (N.Y.C.Cr.Ct. 1979); *see also Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); *cf. Marks v. City of Newport, Ky.*, 344 F.Supp. 675 (E.D.Ky. 1972); *Chulchian v. City of Indianapolis*, 477 F.Supp. 128, 131-132 (S.D. Ind. 1979), *aff'd.*, 633 F.2d 27, 30 (7th Cir. 1980).

5 *See, e.g., State ex rel. Kidwell v. U.S. Marketing Inc.*, 102 Idaho 451, 631 P.2d 622 (1981) and cases there cited.

was recently added in an eleventh hour amendment to 18 U.S.C. § 1961(1). Federal prosecutors have now filed the first federal RICO case where the only alleged predicate offenses involve the interstate transportation of allegedly obscene material.[6]

Since the Department of Justice has now indicated that the Federal Government will be joining in the practice of utilizing RICO sanctions as a new tool for dealing severely with those alleged to have sold or exhibited two or more obscene items, it is incumbent upon this Court to address the threshold question of whether those sanctions can be applied where the exclusive basis for their imposition is allegedly unlawful expressive activity, and if they can be applied at all, whether special procedural safeguards are required.

D. This Court Should Grant Review To Resolve The Same Question of Prior Restraint Upon Which It Noted Probable Jurisdiction in the Case of U.S. Marketing, Inc. v. Idaho, 454 U.S. 1140 (1981), Which Became Moot Prior to Plenary Review.

This Court has already decided that issues virtually identical to those presented by this petition were of sufficient substantiality to warrant the notation of probable jurisdiction. In *U.S. Marketing, Inc. v. Idaho*, 454 U.S. 1140 (1982), this Court noted probable jurisdiction over an appeal from the opinion of the Supreme Court of Idaho ***sub nom. State ex rel. Kidwell v. U.S. Marketing, Inc.***, 102 Idaho 451, 631 P.2d 622 (1981). In that case, the state commenced an action for declaratory and injunctive relief

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6 *United States v. Pryba*, E.D.Va. No. CR 87-00208-A. The indictment in that case was filed on August 14, 1987.

against the owners and lessees of two adult bookstores pursuant to the Idaho Moral Nuisance Abatement Act. The state sought a declaration that some of the materials sold or exhibited by defendants were obscene and asked for an injunctive order to abate the entire premises for a one-year period. Although the trial court found the abatement remedies to be an unconstitutional prior restraint of the type prohibited by *Near v. Minnesota, supra,* the Idaho Supreme Court concluded that that remedy would be constitutionally permissible. This Court then noted probable jurisdiction of the bookstore owners' appeal. 454 U.S. 1140 (1982). However, before the case could be argued, it was dismissed pursuant to Supreme Court Rule 53. 455 U.S. 1009 (1982).

The underlying issue of prior restraint is no less substantial now than it was when this Court noted probable jurisdiction in the *U.S. Marketing* case.

E. Immediate Resolution of This Issue Is Important Because Statutes Such As This One Pose a Severe Danger to the First Amendment Rights of Millions of Americans and to a Wide Range of Communicative Media.

The final, but perhaps most important, reason why this Court should grant review in this case is that the statute upheld in this case represents one of the greatest dangers to the First Amendment rights of millions of Americans and to the entire media industry that has ever been approved by any court.

Statistics cited in news periodicals such as TIME, NEWSWEEK and FORTUNE indicate that sexually frank "adult" films and videotapes have become an increasingly important part of the American entertainment landscape. Community standards have become increasing tolerant regarding adult, sexually-oriented materials, consumption

of which has risen to hundreds of millions of units annually and is predicted to continue to increase dramatically. With respect to videocassette rentals alone, industry statistics indicate some 54,000,000 rentals of X-rated videotapes in 1984, and over one hundred million such rentals in 1986.[7] Moreover, as TIME Magazine (March 30, 1987, at p. 63) has reported, "Women account for perhaps 40% of the estimated 100 million rentals of X-rated tapes each year."

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[7] Several national magazine articles in 1984 provided evidence of the fact that X-rated video cassettes have become standard fare for viewing in American homes: "VCRs: Coming On Strong," TIME Magazine, December 24, 1984 (pp. 44-50); "The Crowded New World of TV," FORTUNE Magazine, September 17, 1984 (pp. 156-166); "The Video Revolution" NEWSWEEK Magazine, August 6, 1984 (pp. 50-57).

According to TIME, nearly 17,000,000 American homes—20 percent of all homes with television sets—now have at least one video cassette recorder. TIME, *supra,* at 45.

> "More than 14,000 pre-recorded [video] cassette [titles] are currently on the market . . . (an estimated 7,000 of them X-rated) . . . ." *Id.*
>
> "An estimated 20,000,000 pre-recorded cassettes will be sold in 1984, better than double the number of a year ago." *Id.*
>
> "[A]n estimated 70 percent to 80 percent of [video cassette recorder owners] buy or rent pre-recorded cassettes at least occasionally." *Id.* at 45.
>
> "Consumers will spend about $1.8 billion dollars to rent cassettes this year and about $500 million dollars to buy them . . . . They rent . . . at prices that average around $5.00 a night and are as low as $1.00 in some cities." FORTUNE, *supra,* at 160.

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"[Explicit] pornography accounts for a hefty share of the cassette business. X-rated movies were among the first to be released for home video and once made up about half of all sales and rentals. That share has dropped to around 15 percent by most industry estimates . . . [M]any VCR owners . . . will sneak-a-peek at X-rated tapes in . . . their own homes." TIME, *supra*, at 47.

"Tapes like these are lining the shelves of more than 12,000 video specialty stores around the country. Their business is skyrocketing." *Id.*

The market is growing explosively. NEWSWEEK estimates that the total annual revenue generated from video rentals and sales could reach $5 billion in 1988, with "adult" materials accounting for 8 percent of that total. NEWSWEEK, *supra*, at 52.

Certain conclusions may be fairly inferred from the foregoing data. If $1.8 billion dollars was spent on video rentals in 1984 (at an average of $5.00 a tape), of which 15 percent was on adult materials, there were 54,000,000 rentals of adult video tapes in 1984. [In light of the fact that there are many stores where tapes rent for substantially less than $5.00 per tape, it is likely that the figure of 54,000,000 rentals is substantially *less* than the actual number of adult video cassette rentals in 1984. Although it is difficult to estimate with any precision the number of people likely to have viewed these 54,000,000 or more rental tapes, any such calculations should take into account the likelihood that most of these tapes were viewed by more than one person. Of course the possibility of multiple rentals by certain consumers should also be considered.]

The corresponding data for 1986 are included in a regularly compiled list of statistical information entitled "Harper's Index," which appeared in the March 1, 1987 edition of the *Los Angeles Times*. Harper's index reported that there were 1,040,000,000 (one billion forty million) rentals of all videotapes in 1986 in the United States. Assuming that the percentage of X-rated video-

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The foregoing statistics demonstrate the obvious proposition that the closure of an adult bookstore by the state not only removes from circulation the particular films or magazines believed to exceed community standards, but also necessarily eliminates the public's access to a vast quantity of sexually-explicit media materials that have achieved a notable degree of community acceptance.

Finally, allowing the Indiana Supreme Court's opinion to stand will not only jeopardize the American public's right to view constitutionally-protected media materials which are sexually-oriented, it will also pose a severe threat to a wide variety of broad-based media industries throughout this country. For example, if a state or federal prosecutor can establish a probable cause showing to convince any judge that two or more videotapes rented by a national audio and video outlet chainstore (*e.g.*, Tower Records, The Warehouse Records & Tapes, etc.) are obscene, every store belonging to that chain within the area of the court's jurisdiction would unquestionably be part of the "racketeering enterprise" and subject to the possibility of massive forfeiture or abatement orders. These orders would restrain not only adult videotapes, but by

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tape rentals dropped from 15% in 1984 to 10% in 1986 (because of the enormous expansion of the total number of videotapes available—not because of a decline in the absolute number of X-rated videos rented), then there were 104,000,000 rentals of X-rated videos in 1986.

padlocking the store, would restrain the business from selling or renting a vast variety of general audience videotapes, record albums, cassettes, etc. Moreover, all of this could be achieved by way of an *ex parte* order without any notice to company officials.

Similarly, if a nationwide bookstore chain such as Waldenbooks or B. Dalton should happen to sell two or more copies of an issue of Playboy or Penthouse that a local judge might believe to be probably obscene, not only could the state issue an *ex parte* order closing the entire store and seizing its assets, but, in all likelihood, it could close every store in the chain subject to its jurisdiction.

In another example, this Court in the case of *Jenkins v. Georgia,* 418 U.S. 153 (1974), reversed the findings of a Georgia jury (affirmed by the Georgia Supreme Court) finding the major studio motion picture "Carnal Knowledge" legally obscene under the *Miller*[8] test for obscenity. If any prosecutor in any local jurisdiction were able to similarly convince a judge, *ex parte,* that there was probable cause that any motion picture produced by a major Hollywood studio were obscene, he or she would be authorized to padlock and seize the entire assets of businesses such as Twentieth Century Fox, Universal Studios, etc., all without any notice to the company.

Similarly, these drastic sanctions would be equally available if any local judge became convinced that two or more issues of a newspaper carrying risque editorial cartoons were probably obscene. In the absence of an adversary hearing where the court could be correctly apprised

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[8] *Miller v. California,* 413 U.S. 15 (1973)

of the legal standards for determining obscenity, it is very likely that such a probable cause finding might be made.

For all the reasons noted above, the dangers to free expression posed by the Indiana statutory procedures upheld by the Indiana Supreme Court in this case are perhaps the greatest ever to come before this Court and require review by this Court to end this serious threat to constitutional liberties.

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Respectfully submitted,

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